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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re JOSE LUIS
VILLALOBOS,
on Habeas Corpus.

2d Crim. No. B294852
(Super. Ct. No. 2013037256)
(Ventura County)

In August 2018, we affirmed Jose Luis Villalobos's conviction for street terrorism (Pen. Code, § 186.22, subd. (a)),¹ second degree robbery (§ 211), and attempted robbery (§§ 664, 211). (*People v. Parra* (Aug. 13, 2018, B282502) [nonpub. opn.].) Villalobos was sentenced to 21 years in prison, consisting of the middle term of three years on the robbery count (§ 213, subd. (a)(2)), doubled to six years under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), plus a consecutive 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) and a consecutive

¹ All further statutory references are to the Penal Code.

five-year prior serious felony conviction enhancement (§ 667, subd. (a)(1)). Execution of the sentence on the remaining counts was stayed pursuant to section 654.

Since Villalobos's sentencing, sections 667 and 1385 have been amended to delete the restriction prohibiting a trial court from striking or dismissing prior serious felony conviction enhancements. The amendments became effective on January 1, 2019, and apply retroactively to all cases not yet final on that date. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973 (*Garcia*).)

After the California Supreme Court denied his petition for review, Villalobos requested that we remand the matter to the trial court to allow it to consider whether to strike the five-year prior serious felony conviction enhancement. We treated the request as a petition for writ of habeas corpus. In responsive briefing, the People agree the new law applies retroactively to Villalobos, but contend he is not entitled to a remand because the record confirms the trial court would not have stricken the prior serious felony conviction enhancement even if it had known it had discretion to do so. Villalobos disputes this contention.

We issued an order to show cause why the requested relief should not be granted. A remand is appropriate unless it is clear from the record that the trial court would not have exercised its discretion to strike the prior serious felony conviction enhancement. We conclude it is not clear on this record. Accordingly, we grant the petition for writ of habeas corpus and remand the matter for the trial court to decide whether to exercise its discretion to strike the enhancement.

DISCUSSION

At the time of Villalobos's sentencing, trial courts had no authority to strike or dismiss enhancements proven under section 667, subdivision (a)(1). (*People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) Senate Bill 1393 removed this prohibition by

amending sections 667, subdivision (a) and 1385 to give trial courts discretion to strike or dismiss prior serious felony conviction enhancements in “furtherance of justice.” (Stats. 2018, ch. 1013, §§ 1-2.)

The parties agree this new law applies retroactively to Villalobos. (See *Garcia, supra*, 28 Cal.App.5th at p. 973.) The People assert, however, that Villalobos has failed to make a prima facie case for habeas relief “because the trial court’s statements at sentencing clearly indicated that it would not have dismissed the enhancement[] in any event.” The People point to the trial court’s denial of Villalobos’s *Romero*² motion to dismiss the prior strike allegation in this case, and its listing of the aggravating factors supporting imposition of the middle term on the robbery count.

As stated in *People v. Gutierrez* (2014) 58 Cal.4th 1354, “[d]efendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary power can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ [Citation.] In such circumstances, we have held that the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion, ‘even if it had been aware that it had such discretion.’” (*Id.* at p. 1391.)

Villalobos maintains it is not clear from the record that the trial court would have declined to strike the prior serious felony conviction enhancement had it been aware of such discretion. When imposing the enhancement, the court stated: “Having

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

found true the special allegation number two, pursuant to [section] 667(a), the defendant is sentenced to state prison for an additional and consecutive term of five years.” The court made no statement suggesting it would have declined to strike the enhancement had that option been available.

In contrast, the trial court in *People v. Johnson* (2019) 32 Cal.App.5th 26, stated at the time of sentencing that it “ha[d] no discretion to strike’ the [defendant’s] serious prior and ‘wouldn’t strike if [it] did have discretion.” (*Id.* at p. 69.) It emphasized that “the murder was a sophisticated, planned execution, that the [defendants] committed the crime despite having no personal motive to kill [the victim], and that they were both previously convicted of murder.” (*Ibid.*) The Court of Appeal acknowledged “the trial court was not sympathetic to [the defendants],” but noted “it is undisputed that the court had no discretion, at that time, to strike the . . . serious prior felony enhancement,” and that trial counsel did not have the opportunity to argue the issue. (*Ibid.*) Accordingly, “out of an abundance of caution,” the Court of Appeal remanded the matter to allow the trial court to consider whether the enhancement should be stricken. (*Ibid.*)

Here, the argument supporting such a remand is much more compelling. Not only did the trial court make no statement indicating it would have declined to strike the prior serious felony conviction enhancement had it the discretion to do so, but it also exercised some leniency in sentencing Villalobos. In a related case (*People v. Villalobos* (Super. Ct. Ventura County, 2013, No. 2013031721).), Villalobos pled guilty to the charge of being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and admitted a prior strike conviction. The court imposed the upper term of three years, but granted Villalobos’s *Romero* motion to dismiss the prior strike. It ordered that the three-year sentence be served concurrently with the sentence in the instant case.

In addition, the trial court granted the prosecution's motion to dismiss a charge involving alcohol in jail, and accepted Villalobos's guilty plea to misdemeanor incitement to riot, with a resulting concurrent sentence of 180 days. The court then granted the prosecution's motion to dismiss three other pending cases.

Because it is not clear on this record that the trial court would have declined to strike the prior serious felony conviction enhancement had it had the discretion to do so, we remand the matter to allow the court to consider whether to strike the enhancement. We express no opinion on how the court should exercise its discretion on remand. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 428.)

DISPOSITION

The petition for writ of habeas corpus is granted. The matter is remanded with directions to the trial court to decide whether it will exercise its newfound discretion to strike the prior serious felony conviction enhancement under sections 667, subdivision (a) and 1385.

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PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David R. Worley, Judge
Superior Court County of Ventura

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Appeal, for Petitioner.

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